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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 429.

SILVIO DEVITA,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR THE STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

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No. 429.

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THE STATE OF NEW JERSEY,

Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Reference to Official Report of Opinion Delivered in the Court Below.

The Supreme Court of New Jersey, the court immediately below, affirmed the judgment of the Superior Court of New Jersey, Law Division, for the reasons expressed in the opinion of the latter court.

The opinion of the Supreme Court of New Jersey is officially reported in *13 N. J. 341, 99 A. (2d) 589;* and the opinion of the Superior Court is reported in *27 N. J. Super. 101, 98 A. (2d) 716.*

II.

Counter-Statement Concerning Jurisdiction.

Counsel for petitioner states that the jurisdiction of this Court is invoked under *Title 28 U. S. C. A., Sec. 453, 1257(3)* (Petition, p. 18, par. 2) and under the cases cited (Petition, p. 18, par 4).

We respectfully submit that the decision of the Supreme Court of New Jersey adopting the opinion of the Superior Court of New Jersey and involving the questions presented in the petition herein, is in conformity with the provisions of the United States Constitution respecting due process of law and the equal protection of the laws as guaranteed therein,[1] and is in conformity with the provisions of the Constitution of the State of New Jersey[2]; and it is submitted that said courts of New Jersey did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction to review the decision of the Court below.

III.

Counter-Statement of the Case.

Petitioner, Silvio DeVita, together with Joseph Grillo and Ralph Rosania, were tried and convicted before a judge and jury on March 8, 1952 in the Essex County Court, State of New Jersey, of the crime of murder in the first degree.

The crime was a felony-murder, the killing of one James Law, a special police officer, on November 9, 1951, in the City

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[1] Constitution of the United States, Amendment XIV, Sec. 1:
"... nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] Art. I, par. 1 of New Jersey Constitution (Revision of 1947):
"All persons ... have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty. ..."

Art. I, par. 10 of New Jersey Constitution (Revision of 1947):
"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury. ..."

of Newark, Essex County, New Jersey, committed during the perpetration of robbery.

For a detailed recital of the facts of the crime established by the evidence submitted by the State at the trial, we refer the Court to State's Brief in opposition to petitioner's former application for a writ of certiorari in this Court in *Silvio DeVita* v. *State of New Jersey*, October Term, 1952, Docket No. 732, under title "Statement of the Facts," pages 3-15.

The jury returned a verdict of guilty of murder in the first degree against all three defendants, but it recommended life imprisonment only as to defendant Rosania and not as to this petitioner DeVita and Grillo.

On March 12, 1952, DeVita and Grillo were sentenced to the death penalty.

They appealed from their conviction to the Supreme Court of New Jersey, and the latter Court, on December 15, 1952, affirmed the judgment of conviction (See *State* v. *Grillo*, 11 N. J. 173; 93 A. 2d 328).

Their application to the Governor of New Jersey for commutation of the death sentence to life imprisonment was denied.

Thereafter they applied to this Court for a writ of certiorari to review the judgment of the New Jersey Supreme Court, and they were denied the writ on June 8, 1953 (See *DeVita* v. *New Jersey*, 345 U. S. 976, 73 S. Ct. 1123).

Petitioner started a new round of appeals by applying to the Superior Court of New Jersey, Law Division, for a writ of habeas corpus, and that Court, on July 2, 1953, allowed the writ upon the claim that the wording of the verdict of the jury was such that the recommendation of life imprisonment attached to the verdict of Rosania could be made to apply to the verdict of this petitioner DeVita,

and upon the further claim that the polling of the jury was conducted in an illegal manner, thereby rendering the entire verdict nugatory and that the trial court was without lawful jurisdiction to impose the death penalty.

After a hearing on the writ of habeas corpus, on July 14, 1953, the Superior Court of New Jersey, Law Division, discharged the writ (See *In re DeVita,* 27 N. J. Super. 101; *sub nomine Ex Parte DeVita,* 98 A. 2d 716).

Petitioner appealed from said judgment to the Appellate Division of the Superior Court of New Jersey, and, while the appeal was pending, the Supreme Court of New Jersey certified the cause for its determination, the certification being made on the Supreme Court's own motion, permissible under New Jersey Supreme Court *Rule 1:10-1 (a).*

On October 19, 1953, after oral argument, the Supreme Court of New Jersey affirmed the judgment of the Superior Court, Law Division, in discharging the writ of habeas corpus for the reasons expressed in the opinion of the latter Court, thus adopting the latter Court's opinion as its own (See *In re DeVita,* 13 N. J. 341).

Petitioner now makes application to this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey and the Superior Court of New Jersey, Law Division.

IV.

Summary of the Argument.

We respectfully submit there was no violation of due process either in connection with the verdict of the jury as announced by the foreman, or the manner in whicl. the jury was polled.

FIRST: The verdict, as announced by the foreman, was that DeVita and Grillo were guilty of murder in the first degree without recommendation of life imprisonment. The verdict was certain, definite, and specific, and it was responsive to the court's charge. The verdict was a good and lawful one upon which the court could impose the death sentence.

SECOND: The manner of polling the jury was legally sufficient, and there was no invasion of the jury's function by the manner in which the poll was taken.

THIRD: The death sentence was imposed by virtue of a final judgment of a competent tribunal of criminal jurisdiction upon a valid verdict of guilty of first-degree murder without recommendation of life imprisonment. Under the circumstances, the writ of habeas corpus is not available.

V.

ARGUMENT.

POINT ONE.

The verdict of the jury was that DeVita was guilty of murder in the first degree, without recommendation of life imprisonment.

The verdict was certain; it was responsive to the Court's charge; and it was a good and legal verdict upon which the Court could impose the death sentence.

The indictment charged the three defendants, DeVita, Rosania and Grillo with the crime of murder in the usual common law form, namely, that they did "willfully, feloniously and of their malice aforethought, kill and murder" James Law (P93a).

The case was tried upon the theory that the killing was done in the perpetration of robbery which, under New Jersey law (*R. S. 2:138-2*), was murder in the first degree; and under another statute (*R. S. 2:138-4*), a person convicted of murder in the first degree shall suffer death "unless the jury shall by its verdict, and as a part thereof, upon and after a consideration of all the evidence, recommend life imprisonment at hard labor," etc.

The Court told the jury that if they did not see fit to attach a recommendation of life imprisonment to a verdict of guilty of murder in the first degree, the penalty would be death (Mimeographed Transcript, p. 1713).

The Court instructed the jury as to the kinds of verdict it could render; and that the verdict as to each defendant should be separable, as follows (Mimeographed Transcript, p. 1713):

> "So, Mr. Foreman and members of the jury, under the facts of this case as they are presented to you, you should bring in one of three verdicts as to each of the defendants, Silvio DeVita, Ralph Rosania and Joseph Grillo. They are either (1) guilty of murder in the first degree, or (2) guilty of murder in the first degree with a recommendation of life imprisonment or (3) not guilty. You will understand, of course, that whichever of the three verdicts you arrive at as to each defendant must be the unanimous verdict of the jury."

The Court named the defendants in the order in which they appeared in the indictment, to wit, DeVita, first; Rosania, second; and Grillo, third.

The Court also instructed:

> "You will recall that I mentioned previously we are in effect trying three cases in one and that each defendant is entitled separately to your considera-

tion and verdict. Therefore the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be the unanimous verdict of the jury: We find the defendant Silvio DeVita guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty, as the case may be.

"Then as to Rosania: We find the defendant Ralph Rosania guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty, as the case may be.

"As to Grillo, the same: We find the defendant Joseph Grillo guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty as the case may be."

When the jury returned to the courtroom, it gave the following verdict (p. 1720) of Mimeographed Transcript; (P89a):

"The Clerk: Ladies and Gentlemen, have you agreed upon a verdict?

"The Foreman: We have.

"The Clerk: Mr. Foreman, how do you find?

"The Foreman: We, the jury, find the defendant Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree."

Thereupon the Court, of its own motion, directed that a poll be taken of the jury on the verdicts or guilty of murder in the first degree, without recommendation, as to DeVita and Grillo, as follows:

> "The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and DeVita."

The Clerk, in polling the jury, first repeated the verdict as announced by the foreman, as follows (P92a-40):

> "The Clerk: Ladies and Gentlemen of the jury, harken to your verdict as the Court will have it recorded. You say by your foreman that you find the defendant Silvio DeVita guilty of murder in the first degree. You further say that you find the defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. Your further say that you find the defendant Joseph Grillo guilty of murder in the first degree."

The Clerk then polled the jury on the verdict as to the defendants DeVita and Grillo, as directed by the Court.

We shall discuss the legality of the poll under separate point.

Here petitioner DeVita argues that, properly construed, the verdict means that the verdict of the jury in which it recommended life imprisonment for defendant Rosania should likewise apply to the petitioner DeVita; or, that the verdict is so ambiguous that the entire verdict should be declared null and void.

It is respectfully submitted that the verdict as announced by the foreman was clear and free from any ambiguity, that the only recommendation of life imprisonment was intended to be attached to the verdict of Rosania and not to that of either DeVita or Grillo.

Under this point, petitioner strongly relies upon the dissenting opinion in the case of *State* v. *Merra,* 103 N. J. L. 361 (N. J. Ct. Errors & Appeals, 1927), which we do not consider to be controlling. In that case there were two

defendants, Merra and Rannelli. The jury brought in the following verdict, "We find the defendant Salvatore Merra guilty of murder in the first degree and the defendant Salvatore Rannelli guilty of murder in the first degree, and recommend life imprisonment at hard labor." While the case was pending on appeal, the State claimed that the verdict as submitted with the case, was inaccurate, and the State made application to the Appellate Court to have the verdict corrected. The case was sent back to the trial court, and after a hearing held, the following verdict was certified as the true verdict:

> "We find Salvatore Merra guilty of murder in the first degree. We find Salvatore Rannelli guilty of murder in the first degree and recommend life imprisonment."

It was held by the Court of Errors and Appeals that the remission of the case to the trial court for clarification of the verdict was justified, and that the record, as corrected, clearly indicated that the recommendation of life imprisonment should apply only to Rannelli and not to Merra. It was noted, too, that the conduct of Merra's counsel in allowing the death sentence to be imposed upon Merra without objection or protest indicated that the verdict was understood to mean that the jury found Merra guilty of first-degree murder without recommendation.

It is to be noted that in the instant case there was no objection or protest made by DeVita's counsel either as to the verdict announced by the foreman or the death sentence imposed by the court, thereby indicating that the verdict was clearly understood to the effect that the jury, by its verdict, found DeVita and Grillo guilty of murder in the first degree without recommendation of life imprisonment.

In the instant case, there was no "correction" made of the verdict, as was done in the *Merra* case, *supra*. There

was no need for any so-called "correction" or clarification of the verdict.

The only difference between the verdict as it appeared in the record before the New Jersey Supreme Court in the first appeal (wherein the legality of the verdict was not raised) and as it appeared in the record in the second appeal on habeas corpus proceedings (wherein the legality of the verdict was raised), is that in the first appeal the verdicts on the three defendants were separated by a comma (Exhibit P-1, P89a-40), while in the second appeal the verdicts were separated by a semi-colon (Exhibit S-1, P92a-30).

It is the respondent's contention that in either case, whether the verdict was one continuous sentence with the individual verdicts separated by a comma, or by a semi-colon, the only grammatical construction to be placed upon the verdict was that DeVita and Grillo were found guilty of murder in the first degree without recommendation, and that the only recommendation of life imprisonment was that attached to the verdict of the defendant Rosania.

State v. *Cleveland,* 6 N. J. 316 is cited and quoted from by petitioner (Pb-22) in support of the proposition that failure of defense counsel to attack the legality of a verdict either directly or by motion in arrest of judgment does not serve to confer upon the trial judge jurisdiction to impose the extreme penalty. Such is also the rule in *State* v. *Cooper,* 2 N. J. 540, cited by petitioner (Pb-22).

We have no quarrel with the rule, except that it is made to apply where the verdict as announced by the foreman, or where the individual verdicts of the jurors on the poll, are *clearly illegal,* and not where both the verdict as announced by the foreman and the individual verdicts of the jurors on the poll are legal in every respect.

In the *Cleveland* case, *supra,* while the foreman announced the verdict "guilty of murder in the first degree,"

when each juror was asked, on the poll, how he found, each replied, "Guilty," *without specifying the degree,* and it was the failure of each juror to affirm his concurrence in the announced verdict by stating the degree which rendered the verdict invalid. In the *Cooper* case, *supra,* the jury's verdict as announced by the foreman was merely "guilty," and on the poll each juror affirmed his concurrence in the verdict as announced by the foreman and without specifying the degree, which was held to render the entire verdict invalid.

That is not the situation here.

In the instant case, the verdicts as to the three defendants were announced by the foreman in the same order as they appeared in the indictment, as follows:

> "We, the jury, find the defendant Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree."

And on the poll, after the clerk repeated the individual verdicts as announced by the foreman, and after each juror was asked to indicate by a yes or no answer whether the verdicts on DeVita and Grillo were his or her verdicts, each juror replied "Yes" without exception.

On page 9 of his Brief, petitioner makes the statement that, "There was doubt as to the verdict, for the court of its own motion directed the clerk to poll the jury on the verdict of only these two defendants."

We submit it was well within the court's discretion, if not its duty where the extreme penalty is involved, to direct a poll of the defendants found guilty of first-degree murder without recommendation of life imprisonment. Such was the case here.

Furthermore, it is provided in the New Jersey Rules of Practice and Procedure (Former Rule 2:7-9d, now 3:7-9d) that, "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion."

The case of *State* v. *Weber,* 127 N. J. L. 274 (1941), cited and quoted from (Pb24), is not in point. There (violation of the Securities Law) the jury's guilty verdict was held legally insufficient because of the trial court's erroneous charge, wherein, instead of confining the jury's consideration to the particular charge laid in the indictment, the court instructed the jury that they could convict if they found that defendant violated "any of the offenses" denounced in the statute which the court read to the jury; and the reversal of conviction was grounded upon the failure of the verdict to be "responsive to the issue raised by the indictment and plea."

That is not the situation here. The jury returned a verdict of guilty of murder in the first degree on all three defendants upon the specific issue as to whether they committed the crime laid in the indictment; the verdict was responsive to the court's charge on that issue; and the verdict was clear and unambiguous when they attached a recommendation of life imprisonment to their verdict as to Rosania but not as to DeVita and Grillo.

State v. *Auld,* 2 N. J. 426 (1949), wherein petitioner quotes from the dissenting opinion (Pb24-25), is not in point. There one of the questions was the propriety of the trial judge, in sending to the jury through a constable, in response to a request from the jury then in deliberation, the possible verdicts they could return, and it was held by the majority of the court that, although improper, it was not ground for reversal.

A case which is illustrative of the point, which tends to support the respondent's contention, is *Commonwealth ex rel. Carey v. Burke,* 365 Pa. 145, 74 A. (2d) 398 (Pa. Sup. Ct., 1950). There the defendant was indicted and tried upon an indictment in two counts, the first for murder and the second for voluntary manslaughter. The jury returned a verdict of "Guilty on the second count (Manslaughter)." The defendant, in habeas corpus proceedings, attacked the legality of the verdict upon the ground that there was no such crime in the Pennsylvania criminal laws of "manslaughter," but only "Voluntary" and "Involuntary" manslaughter; that the verdict was legally defective; that only the jury could correct it; that no such crime was charged in the indictment; that the conviction and sentence thereon were a nullity; and defendant was being deprived of his liberty. The State contended that since a person tried for murder could not be convicted of involuntary manslaughter, but the jury convicted on the second count for voluntary manslaughter, the verdict should be construed as a finding of guilty of voluntary manslaughter since that was the charge laid in the second count; and since the trial judge charged on the four possible verdicts, namely, first-degree murder; second-degree murder; voluntary manslaughter; and not guilty; the verdict was responsive to the charge and should be construed as guilty of voluntary manslaughter. In support of the legality of the verdict, the Court stated, page 399 of 74 A. (2d):

> " . . . It contains within itself and by reference to the indictment, all the necessary elements of the crime, and is a good verdict of conviction upon which sentence may be imposed."

We respectfully submit that in the instant case, the verdict of the jury, as announced by the foreman, was clear,

distinct, and certain; that its meaning was clear to both court and counsel; and it was responsive to the court's charge on the severability of the verdicts as to each defendant. A reading of the verdict could not possibly be misconstrued as to its meaning on the jury's findings, namely, that DeVita and Grillo were guilty of murder in the first degree without recommendation of life imprisonment (buttressed by the polling of the individual jurors) and that the recommendation of life imprisonment was attached only to the verdict as to Rosania.

We further submit that the verdict was amply sufficient in fact and in law to justify the court in imposing the death sentence upon DeVita and Grillo pursuant to the pertinent statutes (*R. S. 2:138-2* and *2:138-4*; now *2A:113-2* and *2A:113-4*).

POINT TWO.

The Court properly directed that a poll be taken on the jury's verdicts as to DeVita and Grillo; and the manner of taking the poll was legally sufficient.

a.

As to the right of the Court to direct a poll as to DeVita and Grillo only.

When the foreman of the jury announced that the verdict as to DeVita and Grillo was guilty of murder in the first degree, without any recommendation of life imprisonment, the Court, on its own motion, directed that a poll be taken of the jury on their verdict as to those defendants, as follows (P90a-10):

> "The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and DeVita."

Under New Jersey Rule of Practice and Procedure 2:7-9(a) (now R. R. 3:7-9a):

> "The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."

The Court's action in directing the poll on its own motion was taken by virtue of Rule 2:7-9(d) (now R. R. 3:7-9d), which reads:

> "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party *or upon the court's own motion.* If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." (Italics ours.)

Undoubtedly, in directing the poll as to DeVita and Grillo, it was the court's purpose to determine whether the jury's verdict of guilty of murder in the first degree, without recommendation, which, under New Jersey law carries the mandatory death penalty, was the unanimous verdict of the jury and whether it had the unanimous concurrence of all of the individual jurors as required by the above-cited Rules.

We cannot agree with petitioner's contention that, once the Court directed the poll, it should have directed a poll on the entire verdict on all three defendants, including the verdict as to the third defendant Rosania to whose first-degree verdict the jury attached a recommendation of life imprisonment.

When the foreman announced the jury's verdict, counsel for Rosania made no request for a jury poll on his verdict. No doubt Rosania's counsel was satisfied with the jury's verdict as to his client with a recommendation of life imprisonment.

Nor did counsel for DeVita and Rosania make any objection to the Court's direction that the poll be taken

only on the verdicts as to their clients and not as to the verdict on Rosania.

Apparently the verdict as announced by the foreman and as it affected the three defendants was clear, distinct, specific, definite, and responsive to the Court's charge on the separability of the verdicts; and the verdict was well understood by all parties concerned.

As to the Court's limiting the poll to the verdicts on DeVita and Grillo, we submit it as well within the Court's function to do so.

We know of no rule of law, nor does petitioner cite any in support of his contention, which precludes the court from directing a poll on one or more of several defendants in a murder case, particularly in a case such as this where the jury made a recommendation of life imprisonment on one of three defendants but did not make a similar recommendation as to the other two.

b.

The Manner of Taking the Poll.

In compliance with the Court's direction, the Clerk first repeated the verdicts as they were announced by the foreman, as follows (P92a-40):

> "The Clerk: Ladies and Gentlemen of the jury, harken to your verdict as the Court will have it recorded. You say by your foreman that you find the defendant Silvio DeVita guilty of murder in the first degree. You further say that you find the defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. You further say you find Joseph Grillo guilty of murder in the first degree."

The Clerk proceeded with the poll as to DeVita and Grillo in accordance with the Court's direction, as follows (P91a-10):

> "By order of the Court the jury is to be polled.
> "You have heard the verdict as rendered by your foreman, wherein you say the defendants Silvio DeVita and Joseph Grillo are guilty of murder in the first degree. As the roll is called, you will answer by a yes or no answer whether this is your verdict or not."

The Clerk proceeded to call the names of each one of the jurors in their numerical order, and each and every one of the jurors responded, without a single exception, with the answer "Yes."

The result of the poll clearly indicated the unanimous concurrence of the individual jurors in the verdicts as announced by the foreman.

There was no objection either to the verdicts or to the poll, or to the manner in which the poll was undertaken, by any of the parties interested in the outcome of the case.

The gist of petitioner's argument seems to be that it was improper for the Clerk, in taking the poll, to first repeat the verdicts as announced by the foreman and then to call upon each individual juror to respond "by a yes or no answer whether this is your verdict or not;" but he claims it was incumbent upon the Clerk to ask each juror the specific question, "How do you find?" (Pb48).

With this we cannot agree.

In *23 C. J. S., Sec. 1392, p. 1071*, on the subject of "Manner of Polling," after stating the general rule that in polling the jury each juror must be questioned "individually and separately," the following appears:

> "While no precise form of question to the individual juror is necessary, the usual practice is to ask each juror simply, 'Is this your verdict?' The juror may be required to answer 'Yes' or 'No', and his detailed explanations may be refused; but the

> exact words used by the juror in answering are immaterial if they indicate clearly his individual assent; his answer may be made by the movement of his head. The inquiry is limited to the fact of the concurrence of the jurors in the verdict as returned; it is not proper to inquire into the reasons actuating the respective jurors in so concurring."

In *53 Amer. Juris. 703, Sec. 1015,* it is stated:

> "Examining the jury by the poll is the most generally recognized means of ascertaining whether they are unanimous in their decision. In no other way can the rights of the parties to the concurrence of the jurors be effectually secured as to have each juror answer the question, 'Is this your verdict?' in the presence of the court and counsel. By this means it can be ascertained for a certainty that no one has been coerced or induced to agree to a verdict to which he does not fully assent. The poll of each member of the jury on the question whether the verdict rendered is the verdict of each juror represents the extent to which the court may go in inquiring of the jurors as to the method of reaching their verdict."

The manner of taking the poll in the instant case differs very slightly from that used in *State* v. *Myers*, 7 N. J. 465 (N. J. S. C., 1951), which was upheld by the New Jersey Supreme Court.

There the foreman of the jury announced the following verdict, "We find the defendant guilty of murder in the first degree and recommend life imprisonment at hard labor." The clerk did not repeat the announced verdict before taking the poll, but he repeated it during the poll before asking each juror the question "Is this your verdict?" And the jurors replied, "Yes," or "Yes, sir," or

"It is." The New Jersey Supreme Court stated, p. 484 of 7 N. J.:

> ". . . The jurors were asked if they found the defendant guilty of murder in the first degree with a recommendation of life imprisonment and each one expressly indicated that was his verdict. Each juror announced his finding of the defendant's guilt and specified the degree of murder. The right of a poll of the jury set forth in R. S. 2:132-2 and Rule 2:7-9(d) was fully satisfied."

In the instant case, before taking the poll, the clerk first repeated the verdict announced by the foreman; and he directed the jurors to indicate in their individual replies "by a yes or no answer whether this is your verdict or not." The clerk did not repeat to each individual juror after calling the juror's name the same verdict which he had repeated before taking the poll.

We submit that, in view of the clerk's repetition of the announced verdict before the poll was commenced, there was no further necessity of again repeating it to each individual juror before securing the juror's reply.

The jurors had been sufficiently apprised of their collective verdict not only by the announcement of the foreman which was clear, distinct and unambiguous, but also by the clerk's repetition of the verdict as announced by the foreman before the individual poll was commenced, and the jurors were given the opportunity of indicating whether or not they concurred in the verdict thus announced and repeated.

Silak v. *Hudson & Manhattan R. R. Co.*, 114 N. J. L. 428, aff'd 115 N. J. L. 504, a civil suit, illustrates the propriety of taking the poll in the manner used in the instant case. There the jury returned a verdict in money damages in favor of the plaintiff and against the defend-

ant. The Clerk asked each juror on the poll, "Do you find in favor of Mrs. Silak in the sum of five hundred dollars and against the Hudson Manhattan Railroad Company?" and each juror replied "Yes." In disposing of defendant's contention that this was not a proper poll, the former Supreme Court of New Jersey said (p. 430 of 114 N. J. L.):

> ". . . The object of the poll is to ascertain for a certainty that each of the jurors approves of the verdict as returned and that no one has been coerced or induced to agree to a verdict to which he does not actually assent. *Humphries* v. *District of Columbia,* 174 U. S. 190, 43 L. Ed. 944 27 R. C. L. 838 states the subject in this wise: 'Examining the jury by the poll is the most generally recognized means of ascertaining whether they are unanimous in their decision. In no other way can the rights of the parties to the concurrence of the jurors be so effectually secured as to have each juror answer the question, 'is this your verdict?' in the presence of a court and counsel. By this means it can be ascertained for a certainty that no one has been coerced or induced to agree to a verdict to which he does not fully assent. 64 C. J. 1059, being section 861 under the title 'Trial' puts it thus: 'Polling the jury is a practice whereby the jurors are asked individually whether they assented and still assent to the verdict. To poll a jury is to call the names of the persons who compose a jury and require each juror to declare what his verdict is before it is recorded. The object of polling a jury is to give each juror an opportunity to declare his present judgment in open court.' In *State Life Insurance Co.* v. *Postal* (Ind.), 84 N. E. Rep. 156, the stating of the verdict as announced by the foreman followed by the question, 'is this your verdict?' placed to the individual jurors was approved. We conclude that the manner of conducting the poll at the trial of the instant case was not

> out of line with the practice and, further, that no harm came to the defendant. It is not intimated that the jury did not in fact agree, all of them, upon the verdict as announced."

In *Margulies* v. *State*, 137 A. 896 (Ct. App. Md., 1927), the verdict was announced by the foreman, "Not guilty of murder but guilty of manslaughter." On the poll, the clerk asked each juror, in turn, "You have heard the verdict of your foreman. Is that your verdict?" Each juror nodded his head and replied, "Guilty of manslaughter." It was held that the court properly refused to strike out the verdict. The Court stated (p. 898 of opinion):

> ". . . In response to the clerk's inquiry, each juror indicated his agreement with the foreman in the rendition of the verdict. It would have been sufficient to answer 'Yes', or 'It is,' to the question whether the verdict of the foreman was the verdict of the juror interrogated. . . ."

In *Duffy* v. *State*, 135 A. 189 (Ct. App. Md., 1926), there were two defendants tried on four indictments, each indictment being based upon the crime of robbery committed on each of four persons during a holdup. The jury returned a verdict of guilty on all four indictments, announced by the foreman. In polling the jurors, the clerk asked each juror, "You have heard the verdict of your foreman: is his verdict your verdict?" While the conviction was reversed on other grounds, the procedure used in taking the poll was approved. The Court said (p. 195 of opinion):

> "It is not clear what the objection to this procedure is. It is not said that each juror was not polled in each case and the form used has been familiar in the practice and procedure in the courts of this state for many years, and it appears to be generally recognized as sufficient. . . ."

The same procedure was approved in *State* v. *Tomlinson*, 74 N. W. 995 (Sup. Ct. N. D., 1898). The clerk first repeated the verdict as announced by the foreman of the jury, and on the poll he asked each juror, "Is this your verdict?" When asked the question, one juror said he desired to make an explanation, not stating what it was. The trial judge refused to allow any explanation to be made at that time but required the juror to make a direct answer to the question, and the juror replied, "Yes." The ruling was held proper.

The case of *State* v. *Vaszorich*, 13 N. J. 99; 98 A. (2d) 299 (N. J. S. C. 1953), discussed at length by petitioner (Pb36-44), strongly supports the State's contention on the legal propriety of the poll.

There, as here, there were three defendants tried for murder (Vaszorich, Brown and Berry). The jury's verdict, as announced by the foreman, was guilty of murder in the first degree, with a recommendation of life imprisonment as to Brown and Berry but not as to Vaszorich. There were three individual polls taken. Before each poll, the clerk asked each juror, "how say you individually" followed by "as to", or "with reference to" or "with respect to (naming the particular defendant)?" In the case of Vaszorich, in response to the question, each juror replied, "Guilty of first-degree murder," or "Guilty of murder in the first degree," with the additional words, "with no recommendation," or "without recommendation." In the case of jurors Nos. 4, 7 and 11, the reply was simply, "Guilty" (without specifying the degree) with the additional words "with no recommendation for mercy," or "with no recommendation," or "no recommendations."

In the poll on Brown, the first five jurors replied, "Guilty of first-degree murder" with the added words, "with recommendation for life imprisonment;" the sixth juror replied,

"Guilty of murder in the first degree, with recommendations;" but the remaining jurors, from No. 7 to 12 inclusive, the reply was simply, "Guilty" (without specifying the degree) with the added words "with recommendation for life imprisonment."

In the poll on Berry, each of the first ten jurors replied, "Guilty of first degree murder" with the added words "with recommendation for life imprisonment," or "with recommendations for life." Jurors Nos. 11 and 12 merely said, "Guilty" (without specifying the degree) with the added words "with recommendations for life imprisonment."

The New Jersey Supreme Court distinguished the case from *State* v. *Turco*, 98 N. J. L. 61; *State* v. *Cooper*, 2 N. J. 540; and *State* v. *Greely*, 11 N. J. 485, upon which petitioner relies in his Brief. In the *Turco* case, *supra*, the verdict announced by the foreman was "guilty" (without designating the degree), and without more the jury was discharged. The verdict was held clearly invalid. In the *Cooper* case, the announced verdict was "guilty," (without designating the degree), and on the subsequent poll each juror affirmed his concurrence in that verdict, and the verdict was held invalid. In the *Greely* case, the announced verdict was "guilty as charged, with a recommendation of life imprisonment," and the verdict was held fatally defective for failure to designate the degree.

The Supreme Court of New Jersey, in affirming the judgment of conviction in the *Vaszorich* case, held that the verdict as announced by the foreman, that all three defendants were "guilty of murder in the first degree", was a good and valid verdict and should not be vitiated by the informal responses of some of the jurors on the poll in failing to specify the decree; that the purpose of the poll under the pertinent Rule 2:7-9(d) is primarily to deter-

mine whether or not there is unanimous concurrence by the individual jurors in the verdict as announced by the foreman, or, as the Court stated, "to ascertain from each juror whether his individual conclusion was correctly expressed by the verdict which the foreman had rendered;" and that the required assent of the jurors need not be in formal or literal style so long as it is unmistakable in meaning. In its opinion the Court suggested that any possible mistake of meaning by the individual jurors, in taking the poll, might easily be averted by having the question posed which would call for the simple answer of "Yes," or "It is," as was done in the *Myers* case, *supra,* which was the method used in the instant case, when it stated, page 129 of 13 N. J. (p. 315 of 98 A. 2d):

> ". . . Trial judges might well minimize the chance of such inadvertent expressions by jurors by polling the jury in the manner used in *State* v. *Myers, supra,* which requires of each juror only the simple response 'Yes,' 'it is,' or the like."

Under this point, petitioner cites and quotes from numerous cases in various jurisdictions which we do not consider to be in point on either the sufficiency of the verdict or manner of taking the poll.

In *Anderson* v. *Penn Hall Co.,* 47 F. Supp. 691 (D. C. Pa., 1942) (Pb26), a civil suit, the jury returned a verdict for the defendant with an explanation that plaintiff was contributorily negligent. A poll was taken in which each juror was asked to reply by a "yes" or "no" answer to the question whether his verdict was that which was announced. Two jurors said "no" and when questioned by the court they said they agreed with the verdict but not with the explanation. It was held that explanations and comments are mere surplusage and form no part of the verdict; and the verdict was held to be unanimous.

In *Bruce* v. *Chestnut Farms-Chevy Chase Dairy,* 126 F. (2d) 224 (C. C. A. D. C., 1942) (Pb27), a civil suit, two jurors, on the poll, dissented from the verdict announced by the foreman, and it was held that the verdict should not have been received and recorded.

In *Ponder* v. *State,* 74 S. E. 715 (Ct. App. Ga., 1912) (Pb27), one juror, on the poll, dissented from the announced verdict and it was held that the dissent indicated a lack of unanimity and the court should have rejected the verdict.

People v. *Lopez,* 131 P. 104 (D. C. App. Cal., 1913) (Pb27), strongly supports the State's contention. There the verdict was guilty of murder in the second degree. The clerk first repeated the announced verdict, and on the poll each juror was asked, "Is this your verdict?" and each juror replied in the affirmative. In disposing of defendant's contention that each juror should have been required to state his personal verdict in his own language without reference to the verdict as announced by the foreman, or, that the announced verdict should have been read to each juror separately before being asked the question "Is this your verdict?", the Court held there was a sufficient compliance with the statutory requirement and the poll was held proper.

In *McCullough* v. *State,* 73 S. E. 546 (Ct. App. Ga., 1912) (Pb27), defendant was convicted of assault and battery with intent to commit rape. Upon a reading of the verdict, while the jury was still in the jury-box, and without giving time to demand a poll, the court "immediately" imposed the maximum sentence of 20 years in the penitentiary. The judgment was reversed, the Court stating that the error was not cured by permitting a subsequent poll, and that the immediate sentence destroyed the right to the poll and rendered it worthless.

In the case of *In re Stern,* 11 N. J. 584 (N. J. S. C., 1953) (Pb28), the issue on a woman's mental competency was tried before a judge and jury. The jury first deliberated 1½ hours, after which they were given further instructions. Jury deliberations were resumed which continued for another 3¼ hours after which a disagreement was reported. The judge gave further instructions in which he urged the jury to arrive at a verdict, stating that the case cost a lot of money and a retrial would take several days. The jury retired and returned with a verdict "almost immediately." It was held that the additional instruction in which the judge stressed the economic element and importance of a verdict, without a cautionary instruction that none of the jurors should surrender his conscientious scruples or personal convictions constituted reversible error.

State v. *Cleveland,* 6 N. J. 316 (N. J. S. C., 1951), extensively quoted from by petitioner (Pb28-32), is not applicable. There the question was not as to the manner of taking the poll, but that the individual verdicts of the jurors on the poll were in themselves faulty which rendered the verdict as announced by the foreman invalid. There the verdict as announced by the foreman was, "Guilty of murder in the first degree." On the poll each juror was asked, "How do you find?" and, without exception, each juror replied simply, "Guilty," without specifying the degree. The question put by the clerk "How do you find?" would naturally have called for the answer "Guilty of murder in the first degree." The Court held that the failure of the jurors to specify the degree rendered the verdict as announced by the foreman fatally defective; and that such failure, or the failure of any dissent on the part of any juror, could not give rise to the inference or presump-

tion of full concurrence in the verdict as announced by the foreman. If, instead of asking the question, "How do you find?" the clerk had asked the jurors the simple question, "Is your verdict the same as that of the foreman?" or, "Is this your verdict?", as occurred in the *Myers* case, *supra,* or if the same manner had been used as in the instant case, the question would have called for the simple reply, "Yes," or "It is," and there would have been a clear indication of individual assent and any mistake of meaning would have been averted.

State v. *Foulds,* 127 N. J. L. 336 (N. J. E. & A., 1941), cited and quoted from by petitioner (Pb33), does not lend support to his contention. There, when the jury first returned to the courtroom, the foreman announced the verdict, "the jury *indicts* Mr. George Foulds for murder in the first degree." (Italics ours.) The court refused to accept the verdict with the word "indicts," and after repeating to the jury any one of four possible verdicts it could render, it directed the jury to retire for further deliberations. Defense counsel immediately moved for disqualification of the jurors, claiming that any further verdict would be illegal, and the motion was denied. Later the jury returned with a verdict of guilty of murder in the first degree. Upon polling the jury, the clerk asked of the foreman, "How do you find?" and the foreman replied, "Guilty." The clerk then asked the foreman, "You say you find the defendant guilty of murder in the first degree; is that your verdict?" And the foreman replied, "I do." The court directed the clerk to again ask the foreman what the jury's verdict was, and the clerk asked, "Mr. Foreman, how say you?" and the foreman replied, "I find the defendant guilty of murder in the first degree." The balance of the jury was directed to be polled, and each juror replied, "Guilty of murder in the first degree." At the conclusion

of the poll, the clerk asked, "And so say you all?" and the jury replied in unison, "We do." It was held that the verdict and the poll were legally sufficient.

In *State* v. *Thursby*, 245 S. W. (2d) 859 (Mo. S. C., 1952), cited and quoted from (Pb34), the verdict announced by the foreman was, "guilty of receiving earnings from a prostitute as charged in the indictment." It was held that the words, "receiving earnings from a prostitute" were mere surplusage and did not render the verdict legally defective. On the question of the trial judge's failure to take an individual poll of the jurors instead of asking the blanket question of the entire jury, "Is this, ladies and gentlemen, your verdict in this case?" the Court made the following significant statement following the excerpt quoted by petitioner (Pb34):

> ". . . But defendant did not complain of or object to that which the trial court did in compliance with the initial request, nor did defendant subsequently point out to the trial court or object on the ground that the jurors individually had not been questioned. While it seems that defendant was then satisfied with the sufficiency of the trial court's inquiry, and should not now be heard to assert error, we, in view of our ruling of the contention (7), infra, find it unnecessary to actually rule the instant contention."

In *Blankenship* v. *State*, 37 S. E. 732 (S. C. Ga., 1900) (Pb34), the reversal was grounded upon the trial judge's failure to poll the jury individually in compliance with defendant's request for a poll, and it was held that the method of having the jurors stand and to be asked collectively if they agreed with the verdict as announced by the foreman was erroneous.

In the instant case, the Court properly directed an individual poll of the jurors, and upon the poll each juror indicated, without exception, his or her concurrence in the verdict as announced by the foreman and repeated by the clerk.

The excerpt from *23 C. J. S., Sec. 1392 (c)*, p. 1071, quoted by petitioner (Pb34), merely affirms the rule that a polling of the jury requires, not a collective inquiry, but an inquiry of each individual juror in order to determine whether or not there was a concurrence in the verdict as announced by the foreman, with which we do not disagree, except that in the instant case the requirement of an individual poll was complied with and fully satisfied.

In *Solar* v. *U. S.*, 86 A. (2d) 538 (Mun. Ct., App. D. C., 1952) (Pb35), one juror, on the poll, said she expressed doubt as to her verdict, stating she had said not guilty but had changed it to "guilty in a way;" and in reply to the inquiry on her verdict she replied, "guilty, I suppose." It was held that the judge should have declined to accept the tendered guilty verdict, and that he should have directed the jury to retire for further deliberations with suitable instructions as to the necessity for arriving at a unanimous verdict.

Likewise, the excerpts from *64 C. J. S., Sec. 861*, p. 1059, quoted by petitioner (Pb35), relates to the meaning of "polling the jury," whereby each juror is called upon to declare his individual judgment in open court, with which there is no dispute.

In *Heinze* v. *State*, 42 A. (2d) (Ct. App. Md., 1945), quoted from (Pb35-36), there were two defendants tried upon an indictment in two counts, for larceny, and for receiving stolen property (the same property they allegedly stole). The clerk asked the foreman what the jury's verdict was, and he replied, "Guilty." The clerk then asked,

"Guilty on the first count, not guilty on the second count?" And the foreman replied, "Yes." The clerk then declared the verdict to be, "Guilty on the first count, not guilty on the second count, as to each defendant, with recommendation of mercy." There was an immediate protest by some of the jurors that they had not recommended mercy. The clerk then redeclared the verdict without the additional recommendation of mercy. Defense counsel then requested a poll, and every juror announced the verdict. "Guilty on the first count, not guilty on the second count, as to each defendant." Defense counsel moved for a mistrial, and to strike out the verdict, judgment and sentence, all of which motions being denied. After reviewing the proper procedure for correcting a verdict as to form or substance, the Court held that defendants had not been prejudiced by the manner in which the verdict was received, and that there was no error in recording the corrected verdict.

We respectfully submit that in the instant case the manner of taking the poll was in full compliance with every legal requirement; that by having the clerk repeat the verdict as announced by the foreman and directing each juror to indicate by a "yes" or "no" answer whether or not such verdict is his individual verdict, is a most proper means of ascertaining to a certainty that the individual jurors had not been coerced or induced to agree to the verdict as announced by the foreman, which is the primary purpose of a jury poll.

In the instant case, the manner in which the jury was polled indicated a complete concurrence by each individual juror in the verdict as announced by the foreman.

c.

As to Petitioner's Points 3 and 4.

Under his Points 3 and 4, petitioner substantially repeats his arguments presented under Points 1 and 2; namely, that the verdict announced by the foreman indicated that the recommendation of life imprisonment attached to the verdict of Rosania should be made to apply to that of DeVita; and that the manner of taking the poll was illegal, thereby rendering the verdict as announced by the foreman fatally defective and the Court was deprived of the right to impose the death sentence upon DeVita.

We consider we have sufficiently discussed these questions under our Points I and II(a) and (b), and no useful purpose can be served by repetition.

Under his Points 3 and 4, petitioner cites and quotes from several cases which we have read and find that they have no application here.

In *State* v. *Greely*, 11 N. J. 485 (N. J. S. C., 1953) (Pb50), as we have already pointed out, the verdict announced by the jury's foreman was, "guilty as charged, with a recommendation of life imprisonment," and it was held that the verdict was defective for failure to designate the degree, even though such a recommendation may be attached only to a first-degree verdict.

In *Commonwealth* v. *Lemley*, 44 A. (2d) 317 (Pa. Super. Ct., 1945) (Pb50), the jury brought in sealed verdicts of acquittal. Upon reading the verdicts, and before recording, the district attorney requested a poll. In the poll some of the jurors answered "Guilty" and others "Not Guilty." The court refused to accept the verdicts and declared a mistrial. It was held that the trial court's action was proper.

In *People* v. *Hicks,* 287 N. Y. 165 (N. Y. Ct. App., 1941) (Pb50), the reversal turned upon an erroneous charge wherein the trial judge told the jury, in effect, that if they were not unanimous in recommending life imprisonment it was their duty to bring in a verdict of first degree murder.

In *Mattice* v. *Maryland Casualty Co.,* 5 F. (2d) 233 (U. S. D. C., 1925) (Pb51), immediately after the verdict was announced, the jury polled, and the verdict recorded, it was made to appear to the trial judge that one of the jurors had dissented from the announced verdict at the time of the poll, and it was held that under the circumstances the trial judge properly granted a new trial for failure of the juror to agree.

None of these cases are in point, and, as we have heretofore pointed out, the manner of taking the poll by having the clerk repeat the verdict as announced by the foreman and directing each juror on the poll to indicate by a "yes" or "no" answer whether the verdict thus announced and repeated was his or her verdict was legally sufficient and in strict conformity with every legal requirement; and all of the rights of petitioner were thereby effectually secured.

POINT THREE.

The death sentence was imposed by virtue of a final judgment of a competent tribunal of criminal jurisdiction upon a valid verdict of guilty of murder in the first degree without a recommendation of life imprisonment; and the writ of habeas corpus was properly discharged.

The death penalty was imposed upon petitioner DeVita as the result of his conviction before a judge and jury in the Essex County Court, of murder in the first degree without recommendation of life imprisonment.

As pointed out under our Points One and Two, the verdict of the jury was certain, specific and responsive to the court's charge; and the polling of the jury was legally sufficient to indicate the unanimous concurrence of the individual members of the jury in the verdict as announced by the foreman.

The judgment of conviction was affirmed by the New Jersey Supreme Court, although the questions presented here were not presented in that appeal (*State* v. *Grillo, supra*).

This Honorable Court denied *certiorari* to review the judgment of the New Jersey Supreme Court upon the conviction (*DeVita* v. *New Jersey, supra*).

Subsequently petitioner applied for, and was allowed, a writ of habeas corpus by the New Jersey Superior Court, upon the claim that he was illegally confined as the result of an allegedly defective verdict and an allegedly unlawful poll of the jury. Petitioner was given a hearing on the writ of habeas corpus, and after argument, the writ of habeas corpus was discharged. (*In re DeVita,* 27 N. J. Super., 101, *supra.*)

The Supreme Court of New Jersey affirmed the judgment of the Superior Court in discharging the writ of habeas corpus (*In re DeVita,* 13 N. J. 341, *supra*).

The real question submitted under petitioner's Point 5 is whether the writ of habeas corpus was properly discharged upon the specific questions relating to the verdict of the jury and the manner of polling the individual jurors; whether the New Jersey Supreme Court properly affirmed the judgment of the Superior Court in discharging the writ of habeas corpus; and whether petitioner's constitutional right to due process was infringed.

It is the State's contention that there was no denial of due process in the trial court in connection with the ver-

dict or manner of polling the jury, nor in connection with the discharge of the writ of habeas corpus.

In the first place, although the writ of habeas corpus may properly be used to secure one's release from illegal custody, the writ is not designed as a substitute for routine and completely adequate rules of practice; nor is it designed to serve the office of an appeal. (*Johnson* v. *Hoy*, 227 U. S. 245, 33 S. Ct. 240, 57 L. Ed. 497.)

If petitioner's true claim be, and apparently such is his claim from his argument, that, by the verdict rendered, the jury intended to recommend life imprisonment for petitioner as well as for Rosania, and that the death sentence instead of life imprisonment was mistakenly imposed by the court, he should have applied to the trial court for a correction of an "illegal sentence" which was available to him under New Jersey Rule of Practice & Procedure 1:2-30(a), now R. R. 3:7-15(a), reading:

> "Where a prisoner is in custody under sentence of a criminal court and claims that the sentence imposed was illegal, he shall apply for correction of the sentence to the court which imposed the same . . ."

On this point, we submit the Superior Court stated significantly, page 108 of 27 N. J. Super.:

> "We have determined that said recommendation did not attach. Assuming, *arguendo*, that his contention is correct, the rule is that an excessive sentence does not make an otherwise valid judgment void. The proper procedure would not have been an application for a writ of habeas corpus but rather a motion to correct an illegal sentence as provided in *Rule* 1:2-30(a). *State* v. *Weeks*, 6 N. J. Super. 390 (App. Div., 1950); *In re Kerchner*, 9 N. J. 471 (1952), affirming 17 N. J. Super. 30 (App. Div., 1951). Treat-

ing his complaint on this phase as such a motion, it is denied."

In the second place, it is significant that petitioner failed to make any attack upon the verdict or manner of the poll in his first appeal to the New Jersey Supreme Court, but he waited until after the first appeal was decided and after this Court denied certiorari before he applied for habeas corpus in the Superior Court.

The Superior Court made a significant comment on this, as follows, page 108 of 27 N. J. Super.:

> "It is interesting to note that although over six months elapsed from the date sentence of death was pronounced until the case was argued on appeal before the Supreme Court of New Jersey the petitioner never mentioned or questioned his sentence of death on this ground. The first time he argued this point was in this court on July 8, 1953—more than 15 months after the sentence was pronounced. It is indeed strange that one so allegedly wronged should be so silent on the subject for so long."

Cases cited and quoted from by petitioner under his Point 5 merely stand for the accepted rule that the legality of a prisoner's custody and detention may be tested by habeas corpus proceedings.

We have no quarrel with the rule, except that in the instant case, as hereinbefore pointed out, the verdict of the jury was clear, certain and unambiguous that petitioner was found guilty of murder in the first degree without recommendation of life imprisonment; that the manner of polling the jury was in accordance with accepted practice; and that the sentence of death was imposed according to law by a competent tribunal.

We, therefore, respectively submit that there is no substance to petitioner's contention that he was denied due process of law on the question of the validity of the verdict or the manner of taking the poll.

VI.

Conclusion.

For the reasons herein set forth, we respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 21 1955
HAROLD B. WILLEY, Clerk

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 429

SILVIO DE VITA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 429

SILVIO DE VITA,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent

PETITIONER'S REPLY BRIEF

I

Summary of Argument

A life can only be forfeited when duly authorized by law. To impose the extreme penalty, there must be a strict compliance with the law. Neither quiescent conduct nor lapse of time can impede the function of the court to independently examine the record to ascertain whether due process in the course of criminal proceedings was accorded any member of the republic.

II

Argument

POINT A—IN THE COURSE OF THE CRIMINAL PROCEEDINGS THERE WAS NO COMPLIANCE WITH THE STATUTE, WHEREUPON THE COURT LACKED JURISDICTION TO IMPOSE THE DEATH PENALTY.

In its opposition to relief for young De Vita, from a course of criminal proceedings during which he was de-

prived of the due process of law to which he is entitled under the Fourteenth Amendment, the State in its brief takes a straddling position. The State says:

> (a) "We have no quarrel with the rule that failure of defense counsel to attack the legality of a verdict either directly or by motion in arrest of judgment does not serve to confer upon the trial Judge jurisdiction to impose the death penalty,"

and then continues to say:

> (b) "There was no objection or protest made by DeVita's counsel either as to the verdict announced by the Foreman or the death sentence imposed by the court;"
>
> (c) "There was no correction made of the verdict as was done in the Merra case;"
>
> (d) "Nor did counsel for De Vita make any objection to the court's direction that the poll be taken only on the verdicts as to their clients and not as to the verdict on Rosania;"
>
> (e) "It is significant that petitioner failed to make any attack upon the verdict of manner of the poll in his first appeal to the New Jersey Supreme Court, but he waited until after the first appeal was decided and after the court denied certiorari before he applied for habeas corpus in the Superior Court;"

and repeating the trial court's contention, the State continued to say:

> (f) "Assuming that De Vita's contention is correct * * * the proper procedure * * * is a motion to correct an illegal sentence * * * which the trial court treated as such and denied."

The State's irreconcilable position is fully countered and disposed of by the New Jersey Supreme Court in the cases

of *State* v. *Cooper*, 2 N. J. 540 and *State* v. *Cleveland*, 6 N. J. 316, wherein it was held,

> "Failure of the accused at the time of sentence to question the sufficiency of the verdict by motion and arrest of judgment, or otherwise, did not serve to confer upon the Judge the jurisdiction to impose the extreme penalty," and much before that time, was set at rest by Blackstone, 1 Blackstone's Commentaries, 928, 3rd Ed., wherein it is stated, "Of crimes injurious to the persons of private subjects, the most principal and important is the offense of taking away that of life; * * * and of which therefor no man can be entitled to deprive himself."

In an exhaustive treatise on the subject, concurred in by Mr. Justice Burton, Mr. Justice Frankfurter, set forth an analytical table in the appendix to his opinion in re: *Andres* v. *U. S.*, 333 U. S. 740, 68 S. Ct. 880 (1948), indicating the movement of the states against the death sentence in capital cases. These eminent jurists say:

> "Prior to 1916 the death penalty was mandatory in New Jersey. In 1916 the law was amended by the enactment of the jury recommendation form of statute. The fair significance to be drawn from State Legislation and the practical construction given to it is that it places into the jury's hands the determination whether the sentence is to be death or life imprisonment. For the first 100 years of the establishment of this government, one guilty of murder in the first degree under federal law was sentenced to death. Since 1897, a jury, after it found an accused 'guilty of the crime of murder in the first degree', may qualify their verdict by adding thereto 'without capital punishment', and whenever the jury shall return a verdict qualified as aforesaid, a person convicted shall be sentenced to imprisonment for life. They must be equally unanimous if they do not wish a finding of guilt to be followed by a death

sentence, which they must express by a finding of guilt 'without capital punishment'."

The Federal Statute, Title 18, Sec. 567, U. S. Code, now provides:

> "In all cases where the accused is found guilty of the crime of murder in the first degree or rape, the jury may qualify their verdict by adding thereto, 'without capital punishment' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

The Statute of New Jersey, R. S. 2A:113-2, 4, now provides:

> "* * * A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree, * * * every person convicted of murder in the first degree * * * shall suffer death unless the jury shall by its verdict and as a part thereof recommend life imprisonment, in which case this and no greater punishment shall be imposed."

The Statute of Pennsylvania, reported in Purdon's Penna. Statutes Annotated, Title 18, Crimes and Offenses, Sec. 4701, now provides:

> "* * * The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. * * * Whoever is convicted of the crime of murder in the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law or to undergo imprisonment for life at the discretion of the jury trying the case, which shall fix the penalty as in other cases. The court shall impose a sentence so fixed as in other cases * * *".

And so, in re: *Winston,* 172 U. S. 303 (19 S. C. 1899), it is stated:

> "The right to qualify a verdict of guilty by adding the words 'without capital punishment' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe nor authorize the court to prescribe any rule defining or circumscribing the exercise of this right but commits the whole matter of its exercise to the judgment and the conscience of a jury. The court cannot control the discretionary power vested by Congress in the jury, for by so doing it will be attributing to Congress an intention unwarranted either by the express words or by the apparent purpose of the statute."

In re: *State* v. *Cooper,* 2 N. J. 540, Supreme Court, N. J. (1949) the court held,

> "The judge did not have jurisdiction to pronounce the sentence of death. It is of the very essence of the statutory procedure that the jury adjudge the degree of guilt and thereby the character of the punishment."

Thus, under Federal law, the words "without capital punishment" and under the Laws of N. J., the words "with recommendation of life imprisonment" are a prerequisite to a life sentence. Under our system of government, courts exercising judicial functions cannot allocate unto themselves any legislative functions, nor superimpose nor interdict a legislative enactment by definition, construction, circumscription or in any other manner. A penal statute must be strictly construed, especially where life is at stake. The polled verdict containing the words, "I do", "Yes", "Yes, Sir", is not a substitute for the statutory words. Life cannot be forfeited, except in the mode prescribed by statute. The individual cannot take his own life, nor can the State take it, except as authorized by law.

In re: *Commonwealth* v. *Ferko,* 112 A. Rep. 38, Supreme Court, Pa. (1920), it is stated,

> "When the question of guilt goes to the jury, the question of the degree goes with it, and the degree is exclusively for them under proper instructions, in which the court may express its own views as to the effect of the evidence, if in such expression, there is no interference with the exclusive right and duty of the jury to pass upon the degree of guilt."

Under the Pennsylvania statute, above quoted, the jury has the discretionary power of fixing the penalty, but its return, collective or polled, need not be in any specific statutory words and may be gathered from the context thereof. Not so, under the Federal statute nor under the statute of New Jersey. Bearing this in mind, it is readily seen that the collective verdict of the jury recommending life imprisonment to young De Vita and to Rosania, the two defendants who did not fire the shot nor kill the decedent, and reading the collective verdict, it can readily be seen that the jury intended life imprisonment for the two boys who did not fire the shot nor kill the decedent. To do otherwise is to infer by a strict, erroneous construction and to speculate upon the verdict. This was not permitted in re: *Duffy* v. *State,* 135 A. R. 189 (2nd. 1920), wherein the court said,

> "• • • in dealing with an absolute constitutional right, the citizen ought not to be at the mercy of speculation."

We now come to the purpose and manner of polling a jury. Each state has the undoubted right to adopt its own rules of criminal procedure in this regard and, as a corollary thereof, it must thereafter comply therewith. The

federal rule, Rule 31(a), U. S. C. Title 18, Criminal Code and Criminal Procedures, states,

> "(a) The verdict shall be unanimous.
>
> "(d) When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

The New Jersey Rule, Rule 2:7-9(a), (d) as to verdicts and poll are similar, (Appendix, petitioner's brief, p. 60-61).

The Penal Code of California, Sec. 1163, provides:

> "The jury may be polled at the request of either party, in which case they must be severally asked 'whether it is their verdict'." In re: People v. Lopez, 131 Pa. 104, D. C. App. Cal. (1913).

So that in all polls, it is required to first ascertain whether there is any specific description in the statute in the manner of polling a jury or whether by a common standard of procedure the states have adopted a certain method and manner of polling a jury. These rules cannot be changed during the course of criminal proceedings to affect an individual being tried for a capital offense.

The result of polling a jury is to eliminate the previously proffered verdict and substitute therefore the individual verdict of each juror, re: *Solar* v. *U. S.* 86 A. Rep. (2d) 538, (1952),

> "Each juror must state publicly and in open court his individual finding".

Thus, is ascertained whether there is the required unanimity. The polled verdict and not the collective verdict is the final verdict of the jury and this final verdict must con-

form to the statutory requirement—nothing less can take life.

In re: *State* v. *Cleveland,* 6 N. J. 316, it is declared,

> "The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at as denoted by the question posed by the Clerk: 'How do you find?' The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict as announced by the Foreman."

The court in re: *State* v. *Foulds,* 127 L. 336, N. J. Ct. E. & A. (1941), ordered the jury poled. Each juror was asked "How do you find?" The learned trial judge with a proper regard for the rights of defendant was most careful that the finding of each of the jurors be ascertained to eliminate any uncertainty.

The practice of long standing was not followed in young De Vita's case. The Clerk did not ask each juror, "How do you find?" nor was each juror free to counter his answer to the clerk's two-fold statement. Nor did each juror's compelled answer comply with the legislative mandate. The court did not have jurisdiction to pronounce the sentence of death.

Whether a sentence is one authorized by law is the function of the writ. In re: *Scott* v. *Aderhold, Warden,* 116 F. 2d 797, (1940).

Where a sentence is void, whatever the procedure pursued, the sentence cannot stand.

"The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute was not violated," so stated the learned Mr. Justice Douglas, in re: *William* v. *Kaiser, Warden,* 323 U. S. 471 (1945).

As was held in re: *Sinclair* v. *Hiatt*, 86 Fed. Supp. 828 (1949),

> "The principle has developed that the writ of habeas corpus should be left sufficiently elastic so that the court may in the exercise of its proper jurisdiction deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."

When in the proceedings, defendant's constitutional rights have been denied, the remedy of habeas corpus is available. Re: *Bowen* v. *Johnston*, 306 U. S. 19, (1939). Or as is more forcefully stated by Mr. Justice Frankfurter in re: *Adamson* v. *People of California*, 332 U. S. 46, 67 S. Ct. 1672,

> "And so, when, as in a case like the present, a conviction in a state court is here for review, under a claim that a right protected by the due process clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight amendments is disclosed by the record. The relevant question is: 'Whether the criminal proceedings, which resulted in conviction, deprived the accused of the due process of law to which the United States Constitution entitled him'. Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the motions of justice of English speaking people even toward those charged with the most heinous offense. These standards of justice are not authoritively formulated anywhere as though they were prescriptions in a pharmacopœia."

Conclusion

The collective verdict recommended life imprisonment. The "so-called" polled verdict is not as prescribed by the statute. The imposition of the death sentence is unwarranted. The court exceeded its powers in the sentence pronounced. The writ ought to be allowed.

Respectfully submitted,

HARRY KAY,
Counsel for Petitioner.

Dated: December 15, 1953.

SUPREME COURT OF THE UNITED STATES

8

No. 57.—October Term, 1953.

George Lewis Dickinson, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 30, 1953.]

Mr. Justice Clark delivered the opinion of the Court.

The principal and decisive issue before us is whether there was a basis in fact for denying Dickinson's claim to a ministerial exemption under § 6 (g) of the Universal Military Training and Service Act, 62 Stat. 611, 50 U. S. C. App. § 456 (g).[1] After the selective service authorities denied his claim, Dickinson refused to submit to induction in defiance of his local board's induction order. For this refusal he was convicted, in the United States District Court for the Northern District of California,[2] of violating § 12 (a)[3] of the Act. The Court of Appeals for the Ninth Circuit affirmed the conviction. 203 F. 2d 336. We granted certiorari. 345 U. S. 991.

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[1] The title was changed from the "Selective Service Act of 1948" to the "Universal Military Training and Service Act" by 65 Stat. 75.

[2] Petitioner waived trial by jury in accordance with Rule 23 of the Rules of Criminal Procedure.

[3] "[A]ny . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Dickinson was sentenced to two years' imprisonment.

Section 6 (g) is the source of the ministerial exemption. It provides, in pertinent part, that "Regular or duly ordained ministers of religion, as defined in this title, . . . shall be exempt from training and service (but not from registration) under this title." Section 16 (g) embodies Congress' definition of a "regular or duly ordained minister of religion."

> "(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> "(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.
>
> "(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a

vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

Registrants who satisfy this definition are entitled to be classified IV–D. 32 C. F. R. § 1622.43.[4]

Dickinson, a Jehovah's Witness, originally claimed IV–D in 1948, shortly after he registered under the Act. At that time he stated, in his classification questionnaire, that he was a "regular" but not an ordained minister, and was working 40 hours a week as a radio repairman. From other documents submitted to the board it appeared that he devoted an uncertain number of hours a week leading two bible study groups and "several hours a week" preaching to the public. On these facts he was classified I–A in July 1950. The validity of this classification is not at issue.

What is at issue is the decision of Dickinson's local board to continue him in I–A in September 1950 after he requested reclassification based on changed conditions in his vocation occurring subsequent to the filing of his questionnaire in 1948. Through his sworn testimony at a personal appearance before the board and subsequent letters to the selective service authorities, and through the affidavit of one C. David Easter, a "supervisor" for the Watchtower Bible and Tract Society in the San Francisco area, supplemented by three letters from the Society itself, Dickinson established the following uncontradicted facts.

In the Spring of 1949 Dickinson voluntarily left his 40 hour-a-week job as a radio repairman and was baptized, the mark of ordination to Jehovah's Witnesses. In August 1949 he was enrolled by national headquarters of the Watchtower Bible and Tract Society and began

[4] Formerly this regulation was numbered § 1622.19, 32 C. F. R. § 1622.19 (1949).

his work as a full time "pioneer" minister, devoting 150 hours each month to religious efforts. This shift in Dickinson's activities occurred after February 1949 when selection under the Act was at a standstill, regular inductions having been halted.[5] As of January 1950 Dickinson changed his residence in order to assume the role of "Company Servant" or presiding minister of the Coalingua, California, "Company," which encompassed a 5,400 square mile area. At that time he dedicated approximately 100 hours each month to actual pioneer missionary work—delivering public sermons, door-to-door preaching, conducting home bible studies. In the remaining 50 hours devoted to religious activities each month, Dickinson studied, planned sermons and discourses, and wrote letters connected with his work. A substantial portion of this time was spent conducting three to four meetings each week of the "Company" or congregation at a public hall in Coalingua. Dickinson arranged for and presided over these meetings, usually delivering discourses at them. He also instructed prospective ministers in the proper delivery of sermons at the "Company's" Theocratic Ministry School. Dickinson received no salary for his missionary or company servant work. He lived on $35 a month earned by a weekly average of five hours of radio repair work. This modest income, a low $15–17.50 a month rental for an apartment, self performance of household tasks, and invitations to various private homes enabled Dickinson to subsist.

Despite this uncontroverted evidence of marked change in Dickinson's activities the local board continued

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[5] Regular inductions resumed in August 1950. Annual Report of the Director of Selective Service 90 (1952). Since induction was not an immediate threat when Dickinson changed his activities, the change itself would hardly show bad faith, if that were an issue. However, bad faith is not at issue in cases such as this.

him in I–A. This ruling was affirmed by the state and national appeal boards, and he was ordered to report for induction on July 16, 1951. Dickinson reported to the induction center but refused to submit to induction. His indictment and conviction followed.

At the outset it is important to underline an elemental feature of this case. The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders. Rather the Act provides, as did the 1917 and 1940 conscription Acts before it,[6] that classification orders by selective service authorities shall be "final." However, in *Estep* v. *United States*, 327 U. S. 114 (1946), a case arising under the 1940 Act, this Court said, at 122–123: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, "is a narrow one, intended for the leaders of the various religious faiths and not for the members generally." S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. *Cox* v. *United States*, 332 U. S. 442 (1947). On the other hand, a legitimate min-

[6] 40 Stat. 80 (1917), 54 Stat. 893 (1940).

ister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's "vocation." And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption.[7]

We think Dickinson made out a case which meets the statutory criteria. He was ordained in accordance with the ritual of his sect and, according to the evidence here, he meets the vital test of regularly, as a vocation, teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion. That the ordination, doctrines, or manner of preaching that his sect employs diverge from the orthodox and traditional is no concern of ours; of course the statute does not purport to impose a test of orthodoxy.

Why, then, was Dickinson denied IV–D? It may be argued that his five hours a week as a radio repairman supplied a factual basis for the denial. We think not. The statutory definition of a "regular or duly ordained minister" does not preclude all secular employment. Many preachers, including those in the more traditional and orthodox sects, may not be blessed with congregations or parishes capable of paying them a living wage. A statutory ban on all secular work would mete out draft exemptions with an uneven hand, to the detriment of

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[7] See 32 C. F. R. § 1622.1 (c).

those who minister to the poor and thus need some secular work in order to survive. To hold that one who supports himself by five hours of secular work each week may thereby lose an exemption to which he is otherwise entitled, would be to achieve a result that Congress so wisely avoided.

The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. The court manifested its own skepticism by pointing to Dickinson's youth, the unorthodox method of ordination by baptism, the failure to present stronger documentary evidence from Watchtower Society leaders, and the customary claim of Jehovah's Witnesses to ministerial exemptions. However, Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here.

Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence.[8] If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply a test of "substantial evidence." However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. The local board may question a registrant under oath, sub-

[8] 32 C. F. R. § 1622.1 (c). See *Lehr* v. *United States*, 139 F. 2d 919, 922 (1944).

poena witnesses to testify, and require both registrant and witnesses to produce documents. 32 C. F. R. § 1621.15. The board is authorized to obtain information from local, state, and national welfare and governmental agencies. 32 C. F. R. § 1621.14. The registrant's admissions, testimony of other witnesses, frequently unsolicited evidence from a registrant's neighbors, or information obtained from other agencies may produce dissidence which the boards are free to resolve. Absent such admissions or other evidence, the local boards may call on the investigative agencies of the federal government, as they would if a registrant were suspected of perjury. But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1953.

George Lewis Dickinson, Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 30, 1953.]

Mr. Justice Jackson, whom Mr. Justice Burton and Mr. Justice Minton join, dissenting.

This Court held in *Estep* v. *United States*, 327 U. S. 114, that in a criminal prosecution under § 11 of the Selective Service Act the court must allow the registrant to prove that his local draft board acted without jurisdiction in classifying him for service. The Court cited several examples of a board acting without jurisdiction, such as where a Pennsylvania board orders a citizen and resident of Oregon to report for induction, or where a board bases classification on the registrant's color or creed in direct defiance of the applicable regulations. But the Court then made this statement: "The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave the registrant." (Emphasis added.) The import was that a local board loses jurisdiction if there are insufficient facts in the record to support its conclusion. The ramifications of such a theory were not explored at the time and have not been clarified by subsequent decisions.[1] But the majority opinion today squarely poses the question of whether such a theory has a place in the statutory scheme of the Selective Service Act.

[1] *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, 316–317; *Gibson* v. *United States*, 329 U. S. 338; *Sunal* v. *Large*, 332 U. S. 174, 176; *Cox* v. *United States*, 332 U. S. 442, 448, 451–455.

When he registered for service in September 1948, petitioner was 18 years old and claimed to have been a minister of religion of the Jehovah's Witnesses for some 15 months. He had not been ordained. He had been trained as a radio engineer, still supported himself by doing radio repair work at night, and worked at this job about 40 hours a week. He conducted two religious meetings a week, each lasting an hour, and he occasionally spoke at other meetings. He also made house-to-house calls. He had prepared for the ministry, he said, by reading the Bible and other texts published by the Jehovah's Witnesses and by taking a course. After he filed his classification questionnaire, petitioner gave up his radio repair work and was ordained by baptism. He was purportedly in charge of missionary work "in a 5,400 square mile section of territory." These events on the eve of his classification and in view of his youth may have raised doubt as to his good faith. The local board and the Appeals Board, without citing their reasons, placed petitioner in Class I–A.

No allegation has been made that the local board or the Appeals Board acted fraudulently or maliciously in this matter. The only logical assumption from the classification is that the boards disbelieved part of petitioner's testimony or doubted his good faith in taking up religious work at the particular time he did. The record itself raises some suspicions, and petitioner's appearance before the local board may well have confirmed these suspicions.

The problem inherent in *Estep* and raised by the majority opinion today is, what is required of the board under such circumstances? It will not do for us to say on the one hand that the board's action is not subject to "the customary scope of judicial review" and that "the courts are not to weigh the evidence," and then on the other to strike down a classification because no affirma-

tive evidence supporting the board's conclusion appears in the record. Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record.

There is nothing in the Act which requires this result.[2] To the contrary, the whole tenor of the Act is that the factual question of whether the registrant is entitled to the claimed exemption shall be left entirely in the hands of the board. The philosophy of the Act is that the obligations and privileges of serving in the armed forces should be shared generally, in accordance with a system of selection which is fair and just. 62 Stat. 604, 50 U. S. C. App. §§ 451–471. To that end it decrees "Except as otherwise provided in this title, every male citizen of the United States . . . who is between the ages of nineteen and twenty-six . . . shall be liable for training and service in the armed forces . . . ." 62 Stat. 605, 50 U. S. C. App. § 454 (a). The Act then sets up several deferments and exemptions including that claimed here. It is the usual rule that he who claims benefit of exceptions in a statute carries the burden of establishing that he is entitled to them. And the decisions of the board on these matters are made "final" by the Act, except where an appeal is authorized. 62 Stat. 620, 50 U. S. C. App. § 460 (b)(3).

Even when we interpret "final" so as to allow judicial review of the board's jurisdiction, it does not follow that

[2] The regulations require the local board to place in the registrant's file for appeal a summary of outside information which was considered by the board. 32 CFR, 1952 Cum. Supp., § 1626.13. I do not interpret this to mean that the board must take the affirmative in securing such information, or that nonevidentiary factors which influenced the board need be summarized, or that in any case these summaries are subject to evaluation by the courts.

jurisdiction may be lost through a lack of evidence. Despite the comment in *Estep* that the board's action is not subject to ordinary review, the Court continues to examine and weigh these purely factual determinations.

Perhaps what bothers the Court is that when no evidence is introduced against a registrant and the board fails to state its reasons for acting, there is no practical way for the trial court to determine whether the correct statutory standard has been applied. I freely admit the difficulty. However, it is one which we should face rather than avoid. Since the record in this case would look the same whether the board acted fraudulently, with a misconception of the law, or in good faith, how is the trial court to proceed in determining the board's jurisdiction? The board, through silence, makes the registrant's task of proving lack of jurisdiction next to impossible.

I think the Act nevertheless requires that in the absence of affirmative proof by the registrant that the board has misconstrued the law or acted arbitrarily, the board's decisions are final and not subject to judicial scrutiny. Whether there is sufficient evidence to grant the exemption is to be left wholly with the board. We do not sit here to weigh the evidence. All factual questions are for the Board, and its decision is final. We may not set aside the Board's finding because we think we might have reached a different conclusion. If it is said that this puts an awesome power in the hands of the selective service authorities, I can only reply that conscription is an awesome business. Congress must have weighed this fact when it passed the Act. It must also have realized that to allow each registrant who is denied exemption a trial on the facts would be to place an impossible block in the way of conscription.